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UNIVERSAL CITY STUDIOS LLC and
NBCUNIVERSAL MEDIA, LLC

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVE WILSON BRIGGS,

Plaintiff,

v.

UNIVERSAL CITY STUDIOS LLC; NBCUNIVERSAL MEDIA, LLC; SONY PICTURES ENT INC.; KEVIN SPACEY; ARI (ARIEL) EMANUEL; MATT DAMON; BEN AFFLECK; NEILL BLOMKAMP; MORDECAI (MODI) WICZYK; ASIF SATCHU; BILL BLOCK; DANA BRUNETTI; MRC II DISTRIBUTION COMPANY LP (AKA MRC, Media Rights Capital, and all other MRC entities and subsidiaries)

Defendants.

Case No. 17-cv-06552-VC
[Hon. Vince Chhabria]

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS UNIVERSAL CITY STUDIOS LLC'S AND NBCUNIVERSAL MEDIA, LLC'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Hearing Date: February, 22, 2018
Time: 10:00 a.m.
Courtroom: 4

DAVIS WRIGHT TREMAINE LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Plaintiff's combined Opposition to the separate Motions to Dismiss filed by NBCU and the other defendants in this action fails to cite any legal authority, or present any factual allegations, that salvage his defective claims against NBCU. Instead, Plaintiff's 24-page Opposition serves to further demonstrate why Plaintiff's theory of liability against NBCU is fundamentally flawed, and why permitting any further amendment would be futile.

First, Plaintiff does not even respond to NBCU's argument that the FAC fails to provide notice of any basis for Plaintiff's claims against these Defendants, as required by F.R.C.P. 8(a). Dismissal of the FAC is warranted for this reason alone. Section II, infra.

Second, Plaintiff's Opposition makes clear that his demand for damages in this case, for the alleged "misappropriation of the Plaintiff's work," is a collateral attack on his unsuccessful prior lawsuit for copyright infringement. Now, Plaintiff claims alleged spoliation and other purported litigation misconduct in the prior case, in a failed attempt to seek the same relief under the guise of alleging "new" claims. The collateral attack doctrine bars disappointed plaintiffs from doing what Plaintiff tries to do here – alleging new, spurious claims in the hope of getting a second bite at the apple. Section III, infra.

Third, the outlandish theory that Plaintiff struggles to explain in his Opposition – which has nothing to do with NBCU – is premised on rank speculation and unfounded conclusions, which do not meet the requisite standards to state a plausible claim. To the extent Plaintiff mentions NBCU at all, he alleges nothing more than the fact that NBCU distributed a motion picture starring Kevin Spacey sixteen years ago. From that benign event, unrelated in any way to Plaintiff's claims, he makes attenuated claims about an unexplained "conspiracy," without ever identifying a single wrongful act purportedly committed by NBCU.

Plaintiff tacitly concedes that there are no facts alleged in the FAC that support either a negligence or gross negligence claim against NBCU. His attempt to conjure spoliation and conspiracy claims relies on out-of-context language from cases and jury instructions that expressly state that neither conspiracy nor spoliation constitute a cause of action. Section IV,

infra. Because Plaintiff has not alleged, and cannot allege, any facts to support any claim against NBCU – and because he already has had two opportunities to do so – his lawsuit against NBCU should be dismissed in its entirety, without leave to amend.

II. PLAINTIFF'S FAC SHOULD BE DISMISSED UNDER RULE 8(A).

As NBCU explained in its Motion To Dismiss, Plaintiff's Complaint violates the requirement under Federal Rule of Civil Procedure 8 that his complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It is undisputed that a "complaint which fails to comply with rules 8(a) and 8(e) may be dismissed with prejudice pursuant to rule 41(b)." See ECF No. 26 ("Mot.") at 4, citing Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981). Plaintiff does not even respond. His FAC should be dismissed for this reason alone.

III. PLAINTIFF EFFECTIVELY CONCEDES THAT THIS CASE IS A COLLATERAL ATTACK ON THE JUDGMENT IN HIS PRIOR UNSUCCESSFUL LAWSUIT.

Plaintiff does not seriously dispute that this action seeks essentially the same relief as his prior action. Mot. at 4. And he cannot deny that the heart of this case is a rehash of the same allegations of infringement that were dismissed on summary judgment in the prior action, dressed up with allegations of litigation misconduct that purportedly occurred in connection with that prior action. He even admits that "[t]his matter has some unquantified relationship to the Prior Action Briggs v. Blomkamp et al, CV 134679-PJH." ECF No. 36 ("Opp.") at 2.

Given these concessions, Plaintiff's attempt to evade the prohibition against collateral attacks on prior judgments rings hollow. For example, he admits that this action seeks "restitution and disgorgement of all profits … the Defendants will realize from the misappropriation of the Plaintiff's work," but claims this is somehow different from the copyright remedy he sought in the prior action, because that lawsuit "made no specific request for financial relief" but merely "reported" the amount of profit the defendants earned from the allegedly infringing film. Opp. at 20 (emphasis added). This is nonsensical. The particular language used by a plaintiff in describing a request for relief is irrelevant; his copyright lawsuit

sought to recover the "profits" from the allegedly infringing work, and this lawsuit seeks precisely the same relief – disgorgement of profits from the film that he claims "misappropriat[ed]" his work. A plaintiff's renewed attempt to seek the same relief through new theories or claims that were not alleged in the prior case is an impermissible collateral attack on that judgment. E.g., Advocare Int'l, L.P. v. Scheckenbach, No. C08-5332 RBL, 2010 WL 2196449, at *2 (W.D. Wash. May 27, 2010) ("Defendants' assertion that Ms. Ruth Ann Box's false testimony led to a fraudulent verdict is an attack on the merits of the prior proceeding. This is an improper basis for a collateral attack on the Texas judgment. Defendants could have presented their argument at the Texas trial, or during the appeal of that case").

In an attempt to evade this clear law, Plaintiff cites to Rein v. Providian Fin. Corp., which held that the collateral attack doctrine does not apply when a party's claims "were never addressed by a prior order or judgment." Opp. at 4 (citing 270 F.3d 895, 902 (9th Cir. 2001)). But Rein is inapposite here. In that case, five different bankruptcy debtors joined together to sue a creditor for previously seeking to recover a debt in their respective bankruptcy proceedings. Id. at 897-98. One debtor had settled after receiving the creditor's demand – before the creditor pursued adversary proceedings – by an agreement that was not court-approved; the others were sued and then entered into court-approved settlements with the creditor. Id. at 898. The court held that the claims by the debtors whose settlements had received court approval were barred by res judicata because those claims could have been raised in the adversary proceedings. Rein, 270 F.3d at 898-99, 902-04. The passage cited by Plaintiff, however, concerned the remaining party. He had settled the matter early and "as a consequence, no adverse proceeding ever was instituted against him." Id. at 898-99, 901-02.[1] It is for that reason that his claims "were never addressed by a prior order or judgment." Id. In other words, Plaintiff could invoke the cited language from Rein only if he had never brought the prior action. However, he did, and cannot relitigate it now.

[1] Plaintiff ignores the other cases cited in the Motion, including a case that is virtually on all fours with the case at hand. Uptergrove v. United States, No. 1:08-CV-01800-OWW-SMS, 2009 WL 1035231, at *1, *2 (E.D. Cal. Apr. 17, 2009) (dismissing case as improper "horizontal appeal" where plaintiff sought to invalidate adverse ruling in prior case by arguing that opposing litigants "intentionally omitted [and] excluded ... evidence ..." in the prior case).

Plaintiff also asserts that "this action involves new parties, new causes, and 13 claims that were not addressed by the prior judgment." Opp. at 4. He ignores the fact that the "new" claims alleged against NBCU target alleged litigation misconduct in the prior action (i.e., conspiracy, spoliation[2]), or seek to recover for the same purported damages sought in the prior action (i.e., negligence, gross negligence and alleged violation of Labor Code § 1700.39). None of these avoid collateral estoppel. Allegations of litigation misconduct must be raised through the "normal appellate process," not a horizontal appeal. Dydzak v. United States, No. 17-cv-04360-EMC, 2017 WL 4922450, at *7 (N.D. Cal. Oct. 31, 2017). And a district court is "without authority to revisit issues that were previously decided in another district court case," i.e., the outcome of Plaintiff's copyright claims in the prior action, and the discovery and evidentiary issues involved in those proceedings. Rinegard-Guirma v. Ocwen Loan Servicing, LLC, No. 3:16-cv-01036-HZ, 2016 WL 4257765 at *3 (D. Or. Aug. 10, 2016). Plaintiff cannot evade these basic principles by embellishing his previously-dismissed copyright claim with a fantastical conspiracy theory involving "new" parties that have nothing to do with the underlying conduct or any of the claims being asserted.[3]

Plaintiff's Opposition provides further support for NBCU's Motion. In stating the facts of the "current action" Plaintiff alleges that he "learned of the infringement around February of 2016" when he discovered that his screenplay had been made "available all around the world" via TriggerStreet. Opp. at 3. Although Plaintiff argues that the distribution on TriggerStreet somehow constitutes a "new violation" of Plaintiff's copyright, he also alleges, in contradiction, that TriggerStreet "was the[defendants'] access point in Briggs v Blomkamp" and "Plaintiff

[2] See, e.g., Opp. at 10.

[3] In fact, principles of claim preclusion (which inform the broader doctrine of collateral attack), apply to "'any claims that were raised or could have been raised' in a prior action." Stewart v. U. S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (emphasis added). Thus, res judicata generally will apply when the second suit involves "infringement of the same right" and "arises out of the same transaction or nucleus of facts." Rein, 270 F.3d at 903. A disappointed litigant may not avoid preclusion merely by randomly naming new parties in the second suit – as Plaintiff seeks to do here – because "under California claim preclusion rules, the only identity of parties required is the identity of the party against whom preclusion is sought." Harper v. City of Monterey, No. 11-cv-02903-LHK, 2012 U.S. Dist. Lexis 7712, at *14 (N.D. Cal. Jan. 23, 2012) (emphasis added). That is Plaintiff – not any of the Defendants.

would subpoena these [TriggerStreet] records if the 9th Circuit remands the matter for trial." Opp. at 9. In short, Plaintiff concedes that he is attempting to relitigate the purported infringement of his screenplay that already was litigated in his prior action. It is clear from Plaintiff's own FAC and Opposition that this case is a prohibited horizontal appeal and must be dismissed for that reason.

IV. ALL OF THE PURPORTED CAUSES OF ACTION AGAINST NBCU SHOULD BE DISMISSED UNDER RULE 12(B)(6).

The only claims alleged against NBCU are conspiracy, spoliation, negligence, and gross negligence; a purported violation of Labor Code § 1700.39 is alleged against Universal City Studios.[4] FAC ¶¶ 256-258. Plaintiff's Opposition provides no basis for any of these claims to proceed. Instead, Plaintiff misstates the law that applies to his conspiracy and spoliation claims, and he tacitly concedes that his negligence and Labor Code claims do not involve NBCU.

A. Plaintiff Cannot Satisfy The Twombly And Iqbal Requirements.

Plaintiff's Opposition purports to identify what he considers to be the most relevant parts of his 60-page, 270-paragraph FAC, distilling them into a 10-page summary that is still fatally flawed. His theory of liability against NBCU consists of the following chain of conjecture concerning "why Universal Pictures would work with Defs Emanuel, MRC, Wiczyk and Satchu" (a business relationship that Plaintiff alleges to be a wrongful act in itself, although he cannot and does not explain how that purported business relationship or any alleged conduct by NBCU is wrongful) (Opp. at 13):

- Talent agencies and management companies have gained power in the entertainment industry, and work with financing companies like MRC to develop projects for their clients, id. at 12;

[4] The Opposition asserts that "neither Motion mentions Breach of Contract" (emphasis in original) – but that cause of action is not alleged against NBCU. See FAC at ¶¶ 238-240. It is asserted only against Defendants Kevin Spacey and Dana Brunetti. Id. The FAC also does not contain any factual allegations that NBCU ever had any agreement with Plaintiff. See, generally, FAC at ¶ 239.

- Defendant Wiczyk predicted in a decades-old memo that "a management company with a lot of big stars would start to produce and own films" by working with a financing company, id. at 13;
- The memo posited that the management company could overcome a possible "studio boycott" because "whichever studio was suffering at the time would probably break ranks" and work with the management company, id.;
- In the late 1990s Universal Pictures was allegedly "in last place" among the studios, id. at 14;
- Unnamed defendants allegedly conspired to encourage Kevin Spacey to launch the social network site TriggerStreet in 2000, for the purpose of stealing Plaintiff's screenplay more than a decade later, id. at 9-10, 14; and
- Universal purportedly cast Kevin Spacey in the film K-PAX, which Plaintiff alleges was "almost inconceivable," given that K-PAX was made in 2001,[5] supposedly "a low point" in Spacey's career, id. at 15.

What this is intended to "prove" is unclear – but if the point is that NBCU must therefore have "conspired" with other defendants for some nefarious purpose, the Olympic-record-sized leaps of inference (paired with conclusory references to all "defendants," without any attempt to identify conduct by NBCU), fail to meet the standard for pleading a conspiracy. To impose liability for an underlying tort based on a theory of conspiracy in California, the plaintiff "must allege the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, and the damage resulting from such acts. In making such allegations bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient." State of Cal. ex rel. Metz v. CCC Info. Svcs., Inc., 149 Cal. App. 4th 402, 419 (2007) (emphasis added) (internal citations omitted) (allegations that parties "conspired to conceal their improper loss valuations"

[5] Contrary to Plaintiff's claims, NBCU did not produce K-PAX. See K-PAX, Company Credits, available at http://www.imdb.com/title/tt0272152/companycredits?ref_=tt_dt_co. And if this is the supposed basis for Plaintiff's claims against NBCU, it is even more apparent that the FAC is legally barred, because it purports to arise from well-publicized transactions that occurred well beyond the applicable statutes of limitations.

amounted to "bare legal conclusions"; affirming grant of demurrer); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) ("a conclusory allegation of agreement at some unidentified point" does not establish conspiracy); Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992) (complaint must "allege specific facts to support the existence of a conspiracy among the defendants"); Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989) ("allegations of conspiracy must be supported by material facts, not merely conclusory statements").

Faced with such outlandish claims, this Court may "draw on its judicial experience and common sense" to dismiss them as inherently implausible. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see also, e.g., Labonte v. Governor of California, No. EDCV 13-1204-VAP (MAN), 2014 WL 1512229, at *6 (C.D. Cal. Apr. 14, 2014) (allegations that multiple law enforcement officers and public officials conspired to fabricate speeding tickets against plaintiff were "inherently implausible"); Mitchell v. Routh Crabtree Olsen, P.S., No. C 11-03577 JSW, 2012 WL 2792360, at *3 (N.D. Cal. July 9, 2012) ("[a]lthough Plaintiff uses the proper words in an effort to create such a conspiracy, the Court finds that the allegations are merely conclusory legal allegations and are inherently implausible"); Daskalakis v. FBI, No. 4:10-CV-221-BLW, 2011 WL 1900439, at *2, *5, *6 *7 (D. Idaho Apr. 28, 2011) ("speculative" and "outlandish" allegations of conspiracy "do not meet Iqbal 's standard of plausibility"), report and recommendation adopted, No. 4:10-CV-221-BLW, 2011 WL 1990661 (D. Idaho May 19, 2011).

Plaintiff's allegations are not merely conclusory, outlandish, and implausible – they are directly contradicted by indisputable facts.[6] For all of these reasons, Plaintiff's latest attempt to elucidate his claims fails to clear the Iqbal hurdle.

[6] Setting aside the inherent implausibility of Plaintiff's claims, the premise on which they are based is false, as established by facts that are not subject to reasonable dispute. Plaintiff's Opposition suggests that NBCU's U.S. distribution of the film K-PAX in 2001 can only have been a payoff to Spacey because Spacey's career was, at that time, "at such a low point." Opp. at 15. In other words, Plaintiff's claims against NBCU are based on his allegation that in 2001, Spacey's career had failed so badly that the alleged conspiracy is the only plausible explanation for NBCU's decision to distribute K-PAX. Even ignoring the blatant speculation needed to draw a connection between K-PAX and the conspiracy Plaintiff alleges, the premise is simply wrong. Two years earlier, Spacey received an Oscar for Best Actor in a Leading Role for his performance in the celebrated film American Beauty. See American Beauty Awards,

B. Plaintiff's Conclusory Conspiracy Allegations Do Not Support A Claim For Relief Under California Law.

Plaintiff misreads the California Jury Instructions as creating a freestanding cause of action for conspiracy. Opp. at ii. They do not. The Instructions he cites simply explain when a co-conspirator may be held liable for another co-conspirator's conduct – but there still must be an underlying tort. CACI 3600. Indeed, the first comment to this section of CACI is the California Supreme Court's holding that "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994) (emphasis added).

As discussed above, Plaintiff's daisy-chain of conjecture does not establish a conspiracy pursuant to which NBCU could be held liable for the alleged conduct of others. Section IV.A, supra. The FAC focuses attention on Ari Emanuel, MRC, Sony, and the other defendants, without pleading a single plausible fact alleging what NBCU supposedly did in connection with the "formation and operation of the conspiracy, [or] the wrongful act or acts done pursuant to it." State of Cal. ex rel. Metz, 149 Cal. App. 4th at 419. To the contrary, the FAC and Opposition make clear that the only "facts" that purportedly support a conspiracy claim against NBCU are 1) NBCU's contact with prominent talent agent Ari Emanuel on other, entirely unrelated matters, and 2) NBCU's distribution of the film K-PAX. FAC at ¶ 28; Opp. at 15. These routine,

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IMDB.com, available at http://www.imdb.com/title/tt0169547/awards?mode=desktop&ref_=m_tt_awd. This Oscar followed a slew of critically-acclaimed films, including The Usual Suspects, L.A. Confidential and Midnight in the Garden of Good and Evil, among others. See Kevin Spacey, Actor, IMDB.com, available at http://m.imdb.com/name/nm0000228/filmotype/actor?ref_=m_nmfm_1. The Court may take judicial notice of facts from the Internet Movie Database ("IMDB"), as these facts – American Beauty's awards, along with Spacey's filmography – are "not subject to reasonable dispute" and IMDB's film database is a publicly available reference source "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201; see also Mull v. Motion Picture Indus. Health Plan, 937 F. Supp. 2d 1161, 1164 (C.D. Cal. 2012) (citing facts from IMDB).

unrelated business interactions do not come close to establishing a common plan or design to engage in wrongful conduct.

C. The Spoliation Claim Does Not Exist Under California Law.

Plaintiff insists that California "allows spoliation claims," relying on the California Supreme Court's decision in Cedars-Sinai Med. Ctr. v. Superior Court, even though it unequivocally held that "there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant." 18 Cal. 4th 1, 17 (1998). Ignoring this unambiguous language, Plaintiff baldly asserts that California courts have recognized spoliation claims where the spoliator is "a third party with a duty to preserve the evidence" or when the victim "does not learn of the spoliation until after trial." Opp. at ii. This entirely misreads language in Cedars-Sinai that was explaining that the Court's decision was not addressing the issue of third-party spoliation:

> We do not decide here whether a tort cause of action for spoliation should be recognized in cases of "third party" spoliation (spoliation by a nonparty to any cause of action to which the evidence is relevant) or in cases of first party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action.

Id. at 17 n.4 (emphasis added). Nothing in the cited language, or in the Court's decision, supports Plaintiff's spoliation claim.

Plaintiff then simply ignores the California Supreme Court's subsequent decision, Temple Cmty. Hosp. v. Superior Court, 20 Cal. 4th 464 (1999), in which it held that "no tort cause of action will lie for intentional third party spoliation of evidence." Id. at 466.[7] In so holding, the Court identified "many of the same considerations" that led to its decision in Cedars Sinai, including the Court's concern that "the same endless spiral of lawsuits over litigation-related misconduct could ensue were we to recognize a tort cause of action for third party spoliation." Id. at 473.

[7] The California Court of Appeal has also foreclosed claims based on negligent spoliation by first or third parties. See Forbes v. Cty. of San Bernardino, 101 Cal. App. 4th 48, 55, 59 (2002). Federal courts have followed this line of authority to hold that California would not recognize claims based on "first party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action." Roach v. Lee, 369 F. Supp. 2d 1194, 1200 (C.D. Cal. 2005).

Notwithstanding this decision, Plaintiff has launched precisely the "spiral of litigation" over alleged misconduct in his prior case, and has dragged NBCU – a third party to that case – into litigation in which it does not belong. Even now, Plaintiff does not pretend to have a shred of evidence to support his spoliation claim against NBCU. Because the California Supreme Court has expressly rejected the possibility of bringing spoliation claims against a third party such as NBCU, and because even if such a claim was viable, Plaintiff has offered no purported facts to support it here, the spoliation claim against NBCU must be dismissed.

D. Plaintiff Has Not Alleged A Single Fact Supporting His Negligence And Labor Code Claims Against NBCU.

Plaintiff did not respond to NBCU's argument that none of the facts in the FAC support a negligence cause of action against NBCU, or a Labor Code claim against Universal City Studios. See Motion at 3, 9-10. Instead, in explaining his claims, Plaintiff emphasizes that the purported gross negligence claim arises from allegations about the conduct of other defendants:

1) Defendant Emanuel supposedly entered into unethical business arrangements and intimidated Sony and defendants other than NBCU, see Opp. at 17-18;

2) "MRC (co-owned by Def Emanuel) and Sony Pictures bought the film and distribution right to Elysium … without ever reading a screenplay … in a hasty meeting in 2008" that did not involve NBCU, id. at 18-19 (emphasis added).

NBCU is not alleged to have participated in any of these transactions, nor does Plaintiff explain how NBCU could be liable for negligence as a result of a purported conspiracy (which, as discussed above, is itself defective). Plaintiff also fails to explain how NBCU had a duty to Plaintiff, or how any such duty was breached by some conduct imputable to NBCU.

Plaintiff appears to have abandoned his Labor Code claim, which is not even mentioned in the Opposition; noticeably absent is any explanation how NBCU could have violated the rule prohibiting a talent agency from dividing fees with an employer. Motion at 9; see also, generally Opp. Consequently, Plaintiff tacitly concedes that the negligence, gross negligence, and Labor Code claims are not supported by any facts alleged in the FAC, and should be dismissed. Because Plaintiff already has had an opportunity to amend his pleading – and still has not

remedied its inherent defects – all of the claims against NBCU should be dismissed with prejudice.

V. CONCLUSION

Plaintiff's strained attempt to re-plead his case through his Opposition brief simply demonstrates that his claims are fatally flawed. Because he already has had an opportunity to amend his Complaint, and cannot cure the defects, the FAC should be dismissed against NBCU without leave to amend.

DATED: February 6, 2018

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